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9 *Attorneys for Defendant Continental Casualty Company, on*
10 *behalf of itself and "CNA Insurance Company, Inc.," which*
is not a legal entity

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

13
14 THE FOCAL POINT, LLC, a California limited
liability company; ANDREW SPINGLER;
15 LINDA SPINGLER; G. CHRISTOPHER
RITTER; and SCOTT HILTON,

16 Plaintiffs,

17 vs.

18 CNA INSURANCE COMPANY, INC.;
19 CONTINENTAL CASUALTY COMPANY,

20 Defendants.

Case No. C-07-05764 MHP

**DEFENDANT CONTINENTAL
CASUALTY COMPANY'S
EVIDENTIARY OBJECTIONS TO
DECLARATION OF ETHAN A.
MILLER IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

[Opposition, Evidentiary Objection to Spingler
Declaration and Joint Statement of Undisputed
Facts Filed Concurrently Herewith; [Proposed]
Order Lodged Concurrently Herewith]

Date: April 28, 2008

Time: 2:00 p.m.

Dept. 15

1 Defendant Continental Casualty Company ("Continental") hereby objects to the
 2 Declaration of Ethan A. Miller dated January 30, 2008, and offered in support of Plaintiffs The
 3 Focal Point, LLC, Andrew Spingler, Linda Spingler, G. Christopher Ritter and Scott Hilton's
 4 Motion for Partial Summary Judgment. Continental objects as follows:

5 Declaration of Ethan A. Miller, paragraph 2, lines 8-11, which states that "...the claim
 6 made against the Plaintiffs by Brian Ward ("Ward"), ..."

7 Objection: Mr. Miller's statement that a claim was made by Brian Ward against Focal
 8 Point itself is inadmissible opinion testimony under Federal Rule of Evidence 701. Moreover,
 9 Mr. Miller's statement is precluded from admission under Federal Rule of Evidence 602 as it is
 10 conclusory and lacks personal knowledge. Mr. Miller provides no foundation as to his personal
 11 knowledge that Mr. Ward was asserting a claim against Plaintiff The Focal Point. Indeed, there is
 12 evidence to the contrary demonstrating that Mr. Ward was *not* asserting a claim against Plaintiff
 13 Focal Point. *See* Continental's Opposition at 3; Declaration of Elliot R. Peters in Support of
 14 Plaintiffs' Motion for Partial Summary Judgment, *Submitted Under Seal*, ¶ 3 and Ex. A .

15 Declaration of Ethan A. Miller, page 1, paragraph 5, lines 27-28, page 2, paragraph 5,
 16 lines 1-4, which states that "CNA claimed that coverage was not available under the Directors &
 17 Officers coverage part of the Policy because Ward was an 'Insured' under the policy, and
 18 'insured vs. insured' claims were excluded from coverage. CNA further claimed that coverage
 19 was not available under the Entity Liability coverage part because, CNA alleged, based on the
 20 January 29 letter from Ward's attorney, it understood the Ward claim to be against the individual
 21 plaintiffs, and that no claim had been made against The Focal Point itself."

22 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of
 23 Evidence 802. The February 5, 2007 letter from Joy Sable to Mr. Miller speaks for itself, and
 24 thus Mr. Miller's characterization of the contents of that letter constitutes inadmissible hearsay.

25 Declaration of Ethan A. Miller, paragraph 6, lines 8-12, which states that "I noted, among
 26 other things, that the Operating Agreement for The Focal Point requires the company to defend
 27 and indemnify its individual members from claims such as the Ward claim and that, because
 28 Spingler et al. had at all relevant times been working on behalf of The Focal Point, a defense was

1 owed to them by the company, and thus there existed a claim against The Focal Point.”

2 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of
3 Evidence 802. The March 20, 2007 letter from Mr. Miller to Joy Sable speaks for itself, and thus
4 Mr. Miller’s characterization of the contents of that letter constitutes inadmissible hearsay.

5 Declaration of Ethan A. Miller, paragraph 7, line 15, which states that “...once again on
6 the ground that no claim had been made against The Focal Point.”

7 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of
8 Evidence 802. The April 5, 2007 letter from Joy Sable to Mr. Miller speaks for itself, and thus
9 Mr. Miller’s characterization of the contents of that letter constitutes inadmissible hearsay.

10 Declaration of Ethan A. Miller, paragraph 8, lines 17-22, which states that “In my letter to
11 CNA I reiterated that, under the law, the fact that CNA had a coverage dispute with the plaintiffs
12 did not relieve CNA of its duty to reimburse the plaintiffs for their defense costs. I also pointed
13 out the fact that CNA had ignored the fact that, because The Focal Point’s Operating Agreement
14 provided that the company was required to defend and indemnify Spingler et al., a claim
15 necessarily existed against The Focal Point itself.”

16 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of
17 Evidence 802. The April 23, 2007 letter from Mr. Miller to Joy Sable speaks for itself, and thus
18 Mr. Miller’s characterization of the contents of that letter constitutes inadmissible hearsay.

19 Declaration of Ethan A. Miller, paragraph 9, lines 25-27, which states that “This letter did
20 not address the indemnity issue that I had pointed out in my previous letter, and instead simply
21 repeated the position taken in the April 23 letter, and stated that “[CNA] will continue to treat this
22 matter as a notice of a potential claim only[.]”

23 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of
24 Evidence 802. The letter from Joy Sable to Ethan Miller marked May 2007 speaks for itself, and
25 thus Mr. Miller’s characterization of the contents of that letter constitutes inadmissible hearsay.

26 Declaration of Ethan A. Miller, paragraph 10, line 2, which states that “...noted that this
27 letter threatened immediate legal action against plaintiffs.”

28 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of

1 Evidence 802. The August 1, 2007 letter from Mr. Miller to Joy Sable speaks for itself, and thus
2 Mr. Miller's characterization of the contents of that letter constitutes inadmissible hearsay.

3 Declaration of Ethan A. Miller, paragraph 11, lines 5-7, which states that "CNA once
4 again summarily denied coverage for the Ward claim. Once again, CNA did not address the issue
5 of indemnify, but simply stated that it was denying coverage for reasons 'set forth in Ms. Sable's
6 prior correspondence[.]'"

7 Objection: This statement by Mr. Miller is inadmissible hearsay under Federal Rule of
8 Evidence 802. The August 13, 2007 letter from Jennifer Faas to Mr. Miller speaks for itself, and
9 thus Mr. Miller's characterization of the contents of that letter constitutes inadmissible hearsay.

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11 Dated: April 4, 2008

Respectfully submitted,

12 ROSS DIXON & BELL, LLP

13
14 By: /s/ Richard A. Simpson

Richard A. Simpson

15 Monique M. Fuentes

16 *Attorneys for Defendant Continental*
17 *Casualty Company, on behalf of itself and*
18 *"CNA Insurance Company, Inc.," which is*
19 *not a legal entity*
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